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UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW
Working Group on
International Payments
Twenty-third session
New York, 3-13 September 1991

INTERNATIONAL COUNTERTRADE

Draft chapters of legal guide on drawing up contracts in international countertrade transactions

Report of the Secretary-General

1. The Commission, at its nineteenth session (1986), in the context of its discussion of a note by the Secretariat entitled "Future work in the area of the new international economic order" (A/CN.9/277), considered its future work on the topic of countertrade. There was considerable support in the Commission for undertaking work on the topic, and the Secretariat was requested to prepare a preliminary study on the subject. 1/

2. At its twenty-first session (1988), the Commission had before it a report entitled "Preliminary study of legal issues in international countertrade" (A/CN.9/302). The Commission made a preliminary decision that it would be desirable to prepare a legal guide on drawing up countertrade contracts. In order for the Commission to decide what further action might be taken, the Commission requested the Secretariat to prepare for the twenty-second session of the Commission a draft outline of such a legal guide. (A/43/17, paras. 32-35.)

1/ Report of the United Nations Commission on International Trade Law on the work of its nineteenth session, Official Records of the General Assembly, Forty-first Session, Supplement No. 17 (A/41/17), para. 243.

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3. At its twenty-second session (1989), the Commission considered the report entitled "Draft outline of the possible content and structure of a legal guide on drawing up international countertrade contracts" (A/CN.9/322). It was decided that such a legal guide should be prepared by the Commission, and the Secretariat was requested to prepare for the next session of the Commission draft chapters of the legal guide. (A/44/17, paras. 245-249.)

4. At its twenty-third session (1990), the Commission considered the following materials prepared by its secretariat: a proposed structure of the legal guide (A/CN.9/332, para. 6); an outline of the introductory chapter to the legal guide (A/CN.9/332/Add.1); draft chapter II, "Scope and terminology of legal guide" (A/CN.9/332/Add.1); draft chapter III, "Contracting approach" (A/CN.9/332/Add.2); draft chapter IV, "General remarks on drafting" (A/CN.9/332/Add.3); draft chapter V, "Type, quality and quantity of goods" (A/CN.9/332/Add.4); draft chapter VI, "Pricing of goods" (A/CN.9/332/Add.5); draft chapter IX, "Payment" (A/CN.9/332/Add.6); and draft chapter XII, "Security for performance" (A/CN.9/332/Add.7). Draft chapter VII, "Fulfilment of countertrade commitment" (A/CN.9/332/Add.8), was submitted to the Commission but was not considered by the Commission. 2/

5. There was general agreement in the Commission with the overall approach taken in preparing the draft chapters, both as to the structure of the legal guide and as to the nature of the description and advice contained therein (A/45/17, para. 16.)

6. The Commission decided that the Secretariat should complete the preparation of the remaining draft chapters and submit them, together with draft chapter VII, "Fulfilment of countertrade commitment" (A/CN.9/332/Add.8), to the Working Group on International Payments. The Commission also decided that the Secretariat should redraft the chapters considered by it at its twenty-third session and the chapters to be submitted to the Working Group on International Payments in the light of the discussion at those sessions. The Commission also decided that the final text of the legal guide should be submitted to its twenty-fifth session, to be held in 1992. (A/45/17, paras. 17 and 18.)

7. Addenda 1 to 6 to the present document contain draft chapters VIII, X, XI, XIII, XIV and XV, prepared pursuant to the above decision of the Commission. Addendum 7 contains sample draft illustrative provisions that may be used in drawing up a countertrade agreement; such illustrative provisions are expected to be set forth in footnotes to chapters of the final text of the legal guide. In preparing those draft chapters and sample draft illustrative provisions, the Secretariat has taken into account a broad range of relevant documents, contracts, books and articles. In addition, the Secretariat has benefitted from the comments of an expert group that was convened by the Commission's secretariat at Vienna from 12 to 15 December 1989.

2/ A summary of the discussion in the Commission on the draft chapters (A/CN.9/332/Add.1-7) is contained in annex I to the report of the Commission on the work of its twenty-third session (A/45/17).

8. The Working Group may wish to consider the structure of these chapters, whether they cover the relevant issues, whether the statements made appropriately take into account the needs of countertrade practice and whether advice given is appropriate.

9. The proposed structure of the legal guide is as follows:

I. INTRODUCTION TO LEGAL GUIDE. This draft chapter, which will describe the origin, purpose, approach and structure of the legal guide, will be prepared for the twenty-fifth session of the Commission (an outline of this draft chapter is contained in A/CN.9/332/Add.1).

II. SCOPE AND TERMINOLOGY OF LEGAL GUIDE (A/CN.9/332/Add.1)*

III. CONTRACTING APPROACH (A/CN.9/332/Add.2)*

IV. GENERAL REMARKS ON DRAFTING (A/CN.9/332/Add.3)*

V. TYPE, QUALITY AND QUANTITY OF GOODS (A/CN.9/332/Add.4)*

VI. PRICING OF GOODS (A/CN.9/332/Add.5)*

VII. FULFILMENT OF COUNTERTRADE COMMITMENT. This draft chapter, contained in A/CN.9/332/Add.8, the Commission referred to the Working Group on International Payments.

VIII. PARTICIPATION OF THIRD PARTIES (addendum 1 to the present document)

IX. PAYMENT (A/CN.9/332/Add.6)*

X. RESTRICTIONS ON RESALE OF GOODS (addendum 2 to the present document)

XI. LIQUIDATED DAMAGES AND PENALTIES (addendum 3 to the present document)

XII. SECURITY FOR PERFORMANCE (A/CN.9/332/Add.7)*

XIII. PROBLEMS IN COMPLETING COUNTERTRADE TRANSACTION (addendum 4 to the present document)

XIV. CHOICE OF LAW (addendum 5 to the present document)

XV. SETTLEMENT OF DISPUTES (addendum 6 to the present document).

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* This draft chapter, submitted to the twenty-third session of the Commission (1990), will be revised in the light of the discussion at that session and any observations made at the twenty-third session of the Working Group on International Payments (1991), and will be submitted to the twenty-fifth session of the Commission in 1992.

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Addendum

VIII. PARTICIPATION OF THIRD PARTIES

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* The text contained herein is a first draft prepared by the Secretariat for consideration by the Working Group on International Payments as part of the preparatory work on the draft legal guide on drawing up contracts in international countertrade transactions and should not be regarded as stating the views of the Working Group.

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A. General remarks

1. This chapter deals with cases in which a party, instead of itself purchasing or supplying goods in a particular direction, engages a third party to do so. Section B discusses the case in which a party originally committed to purchase goods engages a third party to make those purchases. Section C discusses the case in which a third party is designated to supply goods. This chapter also discusses cases in which a supplier of goods in one direction does not assume a commitment to purchase goods in the other direction, but instead a third-party purchaser assumes such a commitment from the outset of the transaction; such cases are dealt with in section D. Section D also discusses cases in which a purchaser of goods in one direction does not assume a commitment to supply goods in the other direction, but instead a third-party supplier assumes such a commitment from the outset.

2. The Legal Guide does not discuss the case in which a party committed to purchase goods engages a third person only to locate persons to whom the goods could be resold or to represent the committed party in the resale of the goods. In such cases the third person does not purchase the goods in its own name. The use by the purchaser of such services by third persons is not discussed since the consent of the supplier is normally not required and such involvement of third persons therefore does not have to be addressed in the countertrade agreement.

3. Cases in which the party committed to purchase goods makes those purchases itself and then resells the goods are not within the subject matter of this chapter. Various restrictions that may be placed on the resale of countertrade goods are discussed in chapter X.

B. Purchase of countertrade goods

4. A party committed to purchase goods frequently cannot use the goods to be purchased, or lacks the marketing capacity or knowledge necessary to resell them. In these cases the party committed to purchase may wish to engage one or more third parties to make the purchases necessary to fulfil the commitment. The third party may be, for example, an end-user of the goods or a trading company specializing in the purchase and resale of certain types of goods.

5. A third-party purchaser who agrees to become involved in the countertrade transaction makes a commitment to the party originally committed (i.e., only to the party who engages the third party) to purchase goods from the supplier within an agreed period of time. In some cases, the third party also makes a commitment to the supplier to enter into future contracts. Since the third party's commitment relates to the conclusion of future contracts, that commitment would address issues such as the type, quality, quantity and price of the goods to be the subject of the future contracts, period for fulfilment of the commitment, restrictions on resale of the goods, security for performance, liquidated damages or a penalty, and settlement of disputes. (Implications of the commitment by the third party are discussed below in paragraphs 15 and 16; the terms of the third party's commitment are discussed below in paragraph 20.)

6. When a third-party purchaser is to be engaged, it is often the case that payment obligations under the supply contracts in each direction are to be settled independently. Such cases do not raise payment issues specific to countertrade. It may be agreed, however, to link payment in the two directions so that the proceeds of the supply contract in one direction are used to pay for the supply contract in the other direction. For a discussion of such linked payment mechanisms, see chapter IX, "Payment", paragraphs 61 to 67.

7. Sometimes the parties to the countertrade agreement agree that the party making purchases beyond what is required to liquidate its outstanding countertrade commitment will be allowed to have the excess fulfilment credit counted towards fulfilment of countertrade commitments that the purchaser may have to assume in the future. Alternatively, a purchaser accumulating such excess fulfilment credit may be permitted to transfer the excess fulfilment credit to a third party (for a discussion of fulfilment credit, see chapter VII, "Fulfilment of countertrade commitment", paragraphs 13 to 16). The transfer of the fulfilment credit to a third party would entitle that third party to sell goods to the party who originally granted the fulfilment credit and to reduce any countertrade commitment by the amount of the transferred fulfilment credit. Such a transfer may involve the payment of a fee by the third party to the transferor of the fulfilment credit. In some countries, the right of transfer of countertrade credit is regulated by law.

1. Countertrade agreement

8. When the parties at the outset of the transaction foresee the possibility that the party committed to purchase will wish to engage a third-party purchaser, it is advisable to address that possibility in the countertrade agreement. Absent a provision authorizing the engagement of a third party, a disagreement may arise as to whether the party originally committed is entitled to engage a third party to fulfil the countertrade commitment. The party originally committed to purchase goods may consider that the commitment is not a personal obligation and that, even without the consent of the supplier, the commitment may be fulfilled by purchases made by a third party engaged by the party originally committed. The supplier, on the other hand, may take the position that the purchases must be made by the party originally committed to purchase the goods. The supplier may be prompted to take such a position, for example, by a belief that the resale of the goods by the party with whom the countertrade agreement has been concluded would establish a place for the goods in the market or maintain the market image of the goods.

9. The participation of third parties in the fulfilment of countertrade commitments may be subject to mandatory rules. Such rules may impose guidelines as to the acceptability of third parties or require governmental authorization of third-party participation. A frequent reason for such restrictions is the desire to prevent the marketing of the goods in traditional export markets of the State in question.

(a) Selection of third party

10. Clauses in the countertrade agreement permitting the engagement of third parties may be formulated in such a way that the party originally committed to purchase goods is free to select the third party. In such

clauses it is advisable to provide that notice of the engagement of a third party must be given to the supplier in advance of the purchases by the third party.

11. Sometimes the countertrade agreement limits the freedom of the party originally committed to purchase goods to select the third party. Various types of limitations may be used. For example, the countertrade agreement may name the third party, list acceptable third parties, or stipulate the criteria to be followed in selecting the third party. Where the countertrade agreement names the third party or contains a short list of potential third parties, the countertrade agreement may provide for the selection of another party if the identified third parties are not in a position to purchase the goods.

12. Another way of limiting the freedom to select a third party is to provide that the party originally committed to purchase goods is not permitted to engage a third party without the consent of the supplier. To expedite the designation of the third party, it may be agreed that the supplier will be deemed to have consented to the designation unless an objection is raised within a specified period of time. It is advisable to indicate in the countertrade agreement the type of information about a proposed third party that the party originally committed to purchase is obligated to furnish to the supplier (e.g., financial standing of the proposed third party and type and quantity of goods to be purchased). In order to limit the discretion of the supplier, the countertrade agreement may identify the types of objections that would be acceptable. Such acceptable objections might be, for example, that the proposed third party is already the supplier's trading partner, that the third party is selling goods produced by competitors of the supplier, or that the third party previously has failed to meet an obligation owed to the supplier or has been involved in a dispute with the supplier.

13. The supplier may have various reasons for wishing to limit the freedom of the party originally committed to purchase in the selection of a third party. One category of reasons is aimed at preventing the selection of certain third parties. For example, restrictions may be designed to prevent sales to existing customers from being counted towards fulfilment of the countertrade commitment, to prevent the engagement of persons active in a particular market (e.g., because of existing distributorship agreements in the market or because of rules applicable to trade with that country), or to ensure that goods requiring special precautions in their use are not purchased by parties not trained to handle them. The other category of reasons is aimed at bringing about the selection of certain third parties. For example, a restriction may be designed to obtain the selection of a third party from a particular country or market or of a third party with experience in particular products or markets (e.g., because the supplier wishes to introduce the goods in a market).

14. The parties should bear in mind, however, that a limitation on the purchaser's freedom to select a third party may have disadvantages. For example, the party originally committed to purchase goods might have to factor into the costs of the transaction the risk that the fee charged by the third party in connection with the purchase of the countertrade goods (see paragraphs 28 to 31 below) might be higher than fees charged by other third parties or the risk that the third party will fail to make the purchases. The parties may agree that some of these risks will be assumed by the supplier who insists on the selection of a particular third party. For example, it may be

agreed that the liability of the party originally committed under the liquidated damages or penalty clause would be reduced to the amount that that party could recover from the third party.

(b) Liability for fulfilment of countertrade commitment

15. It is advisable for the parties to the countertrade agreement to consider the question of who would be liable to the supplier in the event of a failure by the third party to make the purchases needed to fulfil the countertrade commitment. The answer to that question depends on whether the third party has made a commitment to purchase goods only to the party engaging the third party or whether the third party has also made a commitment to the party who is to supply the goods (see above paragraph 5).

16. When the third party's commitment is made only to the party originally committed, the party originally committed remains liable to the supplier for its countertrade commitment even though the third party has been engaged. When, however, the third party makes the commitment both to the party originally committed and to the supplier, two approaches with respect to the commitment of the party originally committed may be considered. One approach is to stipulate in the countertrade agreement that the commitment of the party originally committed to purchase is to be maintained; in such a case, both the party originally committed and the third party will be liable to the supplier for the fulfilment of the commitment, and, ultimately, the party originally committed and the third party would settle the question of responsibility between themselves pursuant to their contract. Such an approach might be appropriate where the third party's commitment to the supplier to conclude future purchase contracts is not supported by the same guarantees as is the countertrade commitment of the party originally committed, or where the supplier has had no experience or has had unsatisfactory experience in dealing with the third party. The other approach is to stipulate that, upon the assumption of the commitment by the third party, the party originally committed will be released from the countertrade commitment, leaving only the third party liable to the supplier for the conclusion of future contracts. In order to implement such a substitution of the party liable to the supplier, the parties may agree on a transfer of the countertrade commitment from the party originally committed to the third party. The general contract law of most countries contains rules on transfers of contractual obligations that would be relevant to a transfer of a countertrade commitment. An alternative method of substituting the party liable to the supplier would be for the party originally committed and the supplier to agree to terminate their countertrade commitment at the moment the third party assumes a commitment to conclude future contracts with the supplier. To ensure that the original countertrade commitment is not terminated before the third party's commitment becomes effective, it is advisable to stipulate in the countertrade agreement that the termination would not take effect until the third party's commitment had become effective.

17. As noted in paragraph 20, below, third parties sometimes limit their commitment to a promise to exercise "best efforts" to make the purchases. When the third party is to replace the party originally committed as the party liable to the supplier, it is advisable that the countertrade agreement stipulate that the commitment of the third party to the supplier should be a commitment to actually purchase goods rather than a "best efforts" type of commitment. If the third party were to make only a "best efforts" commitment, the supplier would have limited assurance that the conclusion of the supply contract would take place.

18. Guarantees issued to support fulfilment of countertrade commitments are normally formulated in such a way that they cover only the obligation of the party originally committed. Therefore, if the supplier wishes to have the third party's commitment secured, it is advisable that the countertrade agreement require that the guarantee be modified or that a new guarantee be issued. It is also advisable that there be an indication of the consequences if the guarantee cannot be modified or an appropriate new guarantee cannot be procured.

2. Contractual relationship between party originally committed and third party

(a) Third party's commitment to purchase goods

19. When the party originally committed to purchase intends to engage a third party to make the purchases, those two parties should reach an understanding as to the type of commitment to be made by the third party.

20. Two types of commitment by third parties to parties originally committed are used in practice. One type is a promise that, subject to the terms of the engagement of the third party, the countertrade goods will actually be purchased. The other type of commitment is a promise by the third party that an effort will be made to purchase goods without an assurance that the effort will be successful. The third party may not be willing to make a full commitment because of uncertainty as to whether an end-user for the goods could be found or whether the purchase price of the goods would be competitive. Such a promise only to make an effort may be described by terms such as "serious intention", "best efforts", or "good-faith efforts" or by a clause to the effect that the third party will purchase the goods if an end-user for the goods can be found. If the third party fails to purchase the goods, it can exonerate itself from the consequences of the failure merely by showing a good faith effort to carry out its mandate. The party originally committed to purchase the goods may find the participation of the third party on a "best efforts" basis acceptable if there is reason to expect that the third party will fulfil the mandate (e.g., because of the third party's record or because the anticipated purchase and resale prices are likely to make the purchase commercially attractive).

21. Sometimes the terms of the contract engaging the third party require the third party to make a commitment directly to the supplier to conclude future contracts (see paragraphs 5 and 15, above).

22. The terms under which the third party is engaged should be coordinated with the terms of the countertrade agreement. The need for coordination exists in particular with respect to the type, quality, quantity and price of the countertrade goods. A problem may arise, for example, if the third party commits itself to purchase goods of a standard quality at a world market price, while the countertrade agreement specifies a different level of quality or price. In such a case, it may occur that the supplier makes available goods that conform to the countertrade agreement but that the third party is justified in refusing to purchase because the goods do not conform to the terms of the contract between the party originally committed and the third party. That would leave the party originally committed to purchase liable to the supplier for non-fulfilment of the countertrade commitment without the possibility of indemnification from the third party.

23. Furthermore, a problem may arise when the countertrade agreement does not contain an assurance as to the availability of the goods but the third party, relying on its contract with the party originally committed, expects the goods to be made available. When such inconsistency exists, the party engaging the third party may be liable to the third party for a failure on the part of the supplier to make the goods available.

24. When the countertrade agreement and the terms of the engagement of the third party both contain an assurance as to the availability of goods, the party originally committed may be liable to the third party for a failure by the supplier to make the goods available. In such a case, it would be in the interest of the party originally committed to obtain the agreement of the supplier to pay liquidated damages or a penalty or to provide a guarantee to support the assurance of the availability of the goods.

25. It is advisable for the contract by which the third party is engaged to reflect any restriction on the resale of goods set out in the countertrade agreement. Otherwise, the party originally committed to purchase may be liable for a resale of the goods by the third party in violation of a restriction set out in the countertrade agreement without the benefit of indemnification from the third party.

26. In some cases, the party originally committed may wish to have an opportunity to make alternative arrangements to fulfil the countertrade commitment in the event that the third party fails to make the necessary purchases. This could be achieved by setting a deadline for purchases to be made by the third party that precedes the deadline for the fulfilment of the countertrade commitment that is binding upon the party originally committed. If the party originally committed wishes to have such an opportunity, it would be advisable, in negotiating the countertrade agreement, to ensure that the fulfilment period is of a sufficient length so as to allow the third party adequate time to make the purchases, as well as to allow the party originally committed to make alternative arrangements should the third party fail to make those purchases.

27. It is advisable to make it clear in the contract for the engagement of the third party whether it is up to the third party to carry out all aspects of the negotiation with the supplier relating to the conclusion of the future contract, or whether the party originally committed to purchase the goods should participate in some way in the conclusion or performance of the contract. It may be provided, for example, that the party originally committed to purchase must approve or at least be informed of a particular aspect of the purchase of the goods (e.g., the price or the destination of the goods).

(b) Third party's fee

28. In return for the third party's commitment to purchase goods, the party originally committed may have to pay a fee to the third party. A fee is normally required when the price of goods to be purchased by the third party is not competitive and the resale of the goods would therefore not be profitable to the third party without the payment of a fee. Such a fee is referred to in practice by expressions such as "commission", "disagio", "subsidy", "discount", "premium", or "compensation". The amount of the fee would depend in particular on the expected difference between the purchase

price and the resale price of the goods. The amount of the fee may also be affected by the cost of any guarantee that the third party would have to procure to cover its liability either to the party originally committed or to the supplier, or to both, for a failure to make the necessary purchases.

29. The fee may be calculated as a percentage of the price of the purchases to be effected by the third party or as an absolute amount per unit or quantity of goods. Sometimes a combination of the two methods is used. If the fee is calculated as a percentage of the price of the goods, it is advisable for the parties to be clear as to the amount on the basis of which the fee is to be calculated (e.g., whether any transport or insurance costs form part of that price).

30. At the time the third party is engaged to conclude the future supply contracts, it may be difficult, due to price fluctuations, to predict the resale price. The parties may therefore provide for a variable fee, to be determined on the basis of the actual difference between the prices, increased by an agreed percentage or amount to cover the third party's costs. Depending upon the underlying commercial circumstances, the parties may wish to consider the possibility that the resale price might rise to a level at which the resale of the goods is profitable for the third party. If this possibility is taken into account, the third party would have to pay an amount to the party originally committed to purchase the goods corresponding to the extent to which the actual resale price increased above the anticipated resale price. Such an amount due from the third party is sometimes referred to as a "negative disagio".

31. It is advisable to specify the point of time when the fee becomes due. It may be provided, for example, that the fee becomes due when the third party is engaged, upon the conclusion of the supply contract between the supplier and the third party, upon the opening of a letter of credit on the instructions of the third party in favour of the supplier, or at the time of payment by the third party to the supplier. Sometimes it is agreed that specified percentages of the fee are payable at different points of time. For example, it may be agreed that a certain percentage of the fee is payable upon the engagement of the third party, a certain percentage upon the conclusion of the contract between the third party and the supplier, and the remainder upon payment by the third party for the goods. When the fee is to be paid subsequent to the conclusion of the contract between the party originally committed and the third party, the third party may request a bank guarantee to secure the obligation to pay the fee.

32. It is advisable for the contract engaging the third party to stipulate whether the contractual relationship between the third party and the party originally committed would be affected by a termination or reduction of the countertrade commitment of the party originally committed. A termination or reduction of the countertrade commitment may result, for example, from the termination of the export contract (see chapter XIII, "Problems in completing countertrade transaction", paragraph). The third party may be interested in completing the purchase and earning the fee irrespective of the fate of the countertrade commitment of the party originally committed, particularly when expenses have been incurred in locating an end-user, when an end-user has been promised the goods or when the goods have actually been purchased and resold. The party engaging the third party, on the other hand, may be interested in being able to terminate the engagement of the third party in the event that the countertrade commitment is terminated.

(c) "Hold-harmless" clause

33. The party originally committed to purchase goods may be liable to the party to whom that commitment is owed when the third party fails to make the anticipated purchases (see paragraphs 15 and 16, above). A party originally committed to purchase goods engaging a third party may therefore wish to include in its contract with the third party a "hold-harmless" clause. According to such a clause, the third party would have to indemnify the party originally committed to purchase for any liability to the supplier resulting from non-fulfilment of the countertrade commitment for reasons imputable to the third party. The parties may also stipulate that the "hold-harmless" clause would protect the party originally committed to purchase goods in the event of a violation by the third party of a restriction on the resale of the goods set out in the countertrade agreement and reflected in the contract engaging the third party. It may be agreed that the party originally committed to purchase the goods is to give the third party notice when a claim is raised that may result in the third party's liability under the "hold-harmless" clause.

(d) Exclusivity of third party's mandate

34. It is advisable for the party originally committed and the third party to indicate in their contract whether the third party is to be the only party engaged or whether the party originally committed reserves the right to engage an additional third party for the purpose of fulfilling the same countertrade commitment. A third party could be given an exclusive mandate with respect to all the purchases to be made in fulfilment of the countertrade commitment or exclusivity could be given only with respect to a particular type of goods, a particular supplier, or a particular territory where the goods are to be purchased or resold.

35. When the third party is given an exclusive mandate, the party originally committed may wish to reserve the right to declare the mandate as non-exclusive if by a specified time before the end of the fulfilment period the third party has not purchased an agreed quantity of goods.

36. When the quantity of goods to be purchased is particularly large, it might be agreed that during a specified period of time the third party is not to be permitted to purchase the same type of goods from other sources. A rationale for such a restriction may be the desire to avoid a temporary oversupply in the market in which the third party plans to resell the goods, or a desire to compel the third party to concentrate its efforts on the fulfilment of the commitment in question.

C. Supply of countertrade goods

37. Sometimes, a party who purchases goods in one direction, does not supply goods in the other direction. Instead, one or more third parties are designated to supply the goods. There are two types of transactions in which such an approach may be used. One type is a transaction in which the party purchasing goods in one direction assumes a commitment for the supply of goods in the other direction, but because of difficulties in making the agreed goods available designates a third party to supply the agreed goods. The other type is an indirect offset transactions as described in chapter II, "Scope and

terminology of Legal Guide", paragraph 13. In indirect offset transactions it is foreseen at the time of the conclusion of the export contract and of the countertrade agreement that the importer (often a governmental agency) will not counter-export goods and that the party committed to counter-import will have to locate third parties willing to supply goods. Those third parties are normally not bound by any commitment to conclude supply contracts with the counter-importer.

38. In a transaction involving a third-party supplier, payment obligations under the supply contracts in the two directions are often settled independently. Payment in such a manner does not raise issues specific to countertrade. However, issues specific to countertrade do arise when the parties decide to link payment in the two directions so that the proceeds of the supply contract in one direction are used to pay for the supply contract in the other direction. For a discussion of such linked payment mechanisms, see chapter IX, "Payment", paragraphs 61 to 67.

39. When the possibility exists that a third party may be involved in the supply of goods, it is advisable for the countertrade agreement to address the means by which the third party supplier is to be selected and the consequences of a failure by the third party to make the agreed goods available.

40. Different approaches may be used for the selection of the third party supplier. One approach is for the countertrade agreement to name the third party. Another approach is for the countertrade agreement to stipulate that the third party supplier is to be agreed upon at a later date. Yet another approach is to leave the selection of the third party to one of the parties to the countertrade agreement.

41. It often occurs in offset transactions that the selection of the third party supplier is left to the party committed to purchase. That selection may be restricted by guidelines established in the countertrade agreement requiring the selection of suppliers from particular geographical regions or industrial sectors, or of suppliers of specific types of products or services. Such guidelines are referred to in chapter VII, "Fulfilment of countertrade commitment," paragraph 7.

42. When the party committed to purchase is to select the third-party supplier, it is advisable to clarify in the countertrade agreement the effect of a failure by a potential third-party supplier to conclude a supply contract. When the selection is to be made from a large number of potential suppliers, it may be stipulated that the refusal by a potential third-party supplier would not result in a release from the commitment to purchase. When the third-party supplier is to be selected from a list of identified suppliers, it may be agreed that a refusal by all the suppliers on the list to conclude a supply contract in conformity with the terms of the countertrade agreement would release the party committed to purchase from its commitment. (For a further discussion of release from the countertrade commitment, see chapter XIII, "Problems in completing countertrade transaction", paragraphs .)

43. In some cases, the selection of third-party suppliers is left to the party who has a right under the countertrade agreement to supply goods. This may be the case when the party purchasing goods in one direction does not engage in the sale of goods (e.g., when a government agency purchases goods in an offset transaction), does not have goods of interest to the party committed

to purchase, or is uncertain as to whether it will have suitable goods at the time the supply contract is to be concluded and therefore wishes to have the option of designating a third-party supplier.

44. When the selection of the third-party supplier is left to the party who is to supply goods under the countertrade agreement, it is advisable to provide that the third party must be in a position to make available goods that conform to the terms of the countertrade agreement. It is also advisable for the countertrade agreement to be clear as to the consequences of a failure by the third party to make the agreed goods available. It may be agreed that such a failure would release the party committed to purchase from the countertrade commitment to the extent that the third party failed to make goods available, or it may be agreed that a new supplier would be selected. When the obligation of the party originally committed to supply is supported by a liquidated damages or penalty clause, or by a guarantee, it may be agreed that a failure by the third party to make the goods available would entitle the party committed to purchase to payment under the liquidated damages or penalty clause or under the guarantee. Alternatively, an obligation to pay liquidated damages or a penalty in case of a failure to make goods available, or to obtain a guarantee to cover such an eventuality, would be assumed by the third-party supplier.

D. Multi-party countertrade

45. There are three types of countertrade transactions that involve more than two parties but are distinct from the transactions covered in sections B and C of this chapter.

46. One type is a tripartite transaction in which a party who supplies goods in one direction does not, at any point in the transaction, make a commitment to purchase goods in the other direction; instead, that commitment to purchase is assumed from the outset by a third party. By contrast, section B covers cases in which a party, after having assumed a commitment to purchase goods, engages a third party to make those purchases. A tripartite structure of this first type may be used, for example, in a buy-back transaction in which the exporter of the production facility does not wish to become involved in the purchase of the resultant products and there is a need, in order to secure financing, to have, at the outset, a third party committed to purchase those products. A tripartite transaction of this type may be initiated through the conclusion by the three parties of an agreement stipulating their commitments to enter into the future supply contracts and then to conclude the supply contracts in the two directions. Another approach is for the exporter and the importer to conclude a contract for the supply of goods in one direction, while at the same time the third-party purchaser (counter-importer) and the counter-exporter enter into a commitment to conclude a future contract for the supply of goods in the other direction.

47. A second type of multi-party transaction is a tripartite arrangement in which a party who purchases goods in one direction does not, at any point in the transaction, assume a commitment to supply goods in the other direction; instead, a third-party supplier assumes, at the outset, a commitment to supply goods. This type of tripartite transaction is distinct from two types of transactions covered in section C: transactions in which a party, after having assumed a commitment to supply goods, designates a third

party to supply those goods, and indirect offset transactions, in which the counter-importer makes a commitment to the importer to negotiate supply contracts with potential suppliers who have not made a commitment to conclude supply contracts with the counter-importer. One contractual approach for this type of tripartite transactions is for the three parties to conclude an agreement stipulating their commitments to enter into the future supply contracts and then to conclude the supply contracts in the two directions. Another approach is for the exporter and the importer to conclude a contract in one direction simultaneously with the assumption by the third-party purchaser (counter-importer) and the counter-exporter of a commitment to conclude a future contract for the supply of goods in the other direction.

48. In many cases, a feature of the tripartite transactions described in paragraphs 46 and 47 is the linkage of payments for the supply contracts in the two directions. The use of such linked payment mechanisms is discussed in chapter IX, "Payment", paragraphs 61 to 67.

49. In a third type of multi-party transaction, the supply contract in one direction is concluded by one set of parties and the supply contract in the other direction is concluded by two other parties. Such a four-party countertrade transaction may be established when the parties to a contract for the supply of goods in one direction are not themselves in a position to conclude a supply contract in the other direction but are interested in the conclusion of such a supply contract. There may be interest in such an arrangement because the conclusion of the second supply contract would enable the parties to link payments for the contracts in the two directions so as to avoid or reduce cross-border currency transfers (linkage of payments in four-party transactions is discussed in chapter IX, "Payment", paragraphs 61 to 67). Another reason for being interested in such an arrangement may be that the supply of goods in one direction is subject to a mandatory requirement of a purchase of goods in the other direction.